82-1602

In the Supreme Court
OF THE
United States

October Term, 1982

PHOENIX BAPTIST HOSPITAL AND MEDICAL CENTER, INC.
Petitioner,

vs.

SHS HOSPITAL CORPORATION, JCL HOSPITAL CORPORATION AND LINCOLN SAMARITAN HOSPITAL AND HEALTH CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the State of Arizona's issuance of a certificate of need for a hospital to be operated by two competitors affords those private parties antitrust immunity under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), where the combination between the two competing hospitals is not required by state law, where there is no clear state policy favoring anticompetitive combinations between competing hospitals and where the competitors' challenged activities are not actively supervised by the state?

2. Whether the *Noerr-Pennington* doctrine provides total antitrust immunity for a far-reaching conspiracy to restrain trade one of the terms of which is to corrupt and abuse the administrative and adjudicatory processes through *ex parte* pressures on persons designated to perform those administrative and adjudicatory functions and where one of the effects is to deny free and unlimited access to administrative and adjudicatory proceedings?

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NO. _____

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PHOENIX BAPTIST HOSPITAL AND MEDICAL CENTER, INC.
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SHS HOSPITAL CORPORATION, JCL HOSPITAL CORPORATION AND LINCOLN SAMARITAN HOSPITAL AND HEALTH CENTER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Phoenix Baptist Hospital and Medical Center, Inc. (hereinafter "Phoenix Baptist") respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 25, 1982.

OPINIONS BELOW

The judgment of the District Court entered September 23, 1981 (Appendix C), the opinion of the United States Court of Appeals for the Ninth Circuit entered August 25, 1982 (Appendix A), and the order of the Court of Appeals entered December 28, 1982 (Appendix B) have not yet been officially reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed August 25, 1982. Phoenix Baptist's timely petition for rehearing and suggestion for rehearing en banc were denied December 28, 1982, and this petition is filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act, 15 U.S.C. § 2 provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

Section 7 of the Clayton Act, 64 Stat. 1125, ch. 1184, § 1, as applicable here provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of

such acquisition may be substantially to lessen competition or to tend to create a monopoly.

STATEMENT OF THE CASE

Petitioner Phoenix Baptist is a 221-bed hospital in Phoenix, Arizona which brought this action against respondents and other defendants for alleged violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and section 7 of the Clayton Act, 15 U.S.C. § 18.[1] Named as defendants were respondents SHS Hospital Corporation (hereinafter "SHS") and JCL Hospital Corporation (hereinafter "JCL") both of which are subsidiaries of competing hospitals, and Lincoln-Samaritan Hospital and Health Center (hereinafter "Lincoln-Samaritan"), another competing hospital which SHS and JCL formed as a joint venture.[2]

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[1] C.R at 5-29. (References are to the pages of the Excerpts of the Clerk's Record filed with the Court of Appeals.)

[2] The defendants in the District Court also incuded Samaritan Health Service, a competing multi-hospital chain, which is the parent corporation of SHS, and various other corporations owned or controlled by Samaritan. Within the Phoenix metropolitan area, Samaritan operates Good Samaritan Hospital, a 695-bed hospital; Desert Samaritan Hospital, a 273-bed hospital; Maryvale Samaritan Hospital, a 256-bed hospital; Glendale Samaritan Hospital, a 62-bed hospital; and three outpatient ambulatory care centers. (C.R. at 9-10) Samaritan's affiliated corporations named as defendants are Arizona Hospital Service Corporation which is engaged in the business of selling linen and laundry services to hospitals; Health Enterprises, Inc. which sells management support and consulting services to hospitals; Standard Surgical Supply which sells medical supplies to hospitals; and Hospital Ambulance Service of Arizona, Inc. which is in the business of providing air and ground medical transportation. (*Id.* at 10-11)

The other defendant was John C. Lincoln Hospital, a competing 282-bed hospital which is the parent corporation of JCL. Phoenix Baptist and John C. Lincoln Hospital reached a settlement and Lincoln was dismissed from the lawsuit.

The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1337 and sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 16 and 26.

Phoenix Baptist alleged that beginning at least as early as 1963 defendants engaged in a continuing combination and conspiracy to restrain trade in and to monopolize the business of providing hospital services in the Phoenix metropolitan area. (C.R. at 17-21) The specific terms of the conspiracy included "eliminat[ing] . . . Phoenix Baptist as a competitor" and otherwise "boycott[ing] . . . hospitals which were not part of the continuing agreement" (C.R. at 18, ¶¶ 32(a) and (i)); entering into a variety of vertical and horizontal mergers, acquisitions and joint ventures (C.R. at 18, ¶¶ 32(c), (d) and (f)); allocating the market among competing hospitals (C.R. at 18, ¶ 32(e)); "preventing . . . the entry or the expansion . . . [of] competing . . . hospitals" (C.R. at 18, ¶¶ 32(g) and (h)); and placing the conspirators' "employees . . . on the boards of . . . health insurance companies, health insurance administrators and regulatory bodies in order to influence the action taken by those companies, administrators and bodies in their favor and against the interests of . . . hospitals which were not part of the continuing agreement." (C.R. at 18-19, ¶ 32(j)) Phoenix Baptist alleged that respondents and the other defendants did those things which they had agreed to do including, among other things, the following:

> (g) Prepared and filed joint and agreed-upon applications for certificates of need in order to reduce and eliminate competition between themselves.
>
> (h) Prepared and filed collusive and agreed-upon applications for certificates of need which were the result of their unlawful agreement to allocate and divide the market for hospital services.
>
> (i) Refrained from filing applications for certificates of need which would have conflicted with

> those applications which had been agreed upon by defendants and their co-conspirators pursuant to their unlawful agreement to allocate and divide the market for hospital services.
>
> (j) Appeared in opposition in virtually all proceedings instituted by plaintiff Phoenix Baptist and by other . . . hospitals which were not part of the continuing agreement . . . .
>
> (k) Corrupted and abused the administrative and adjudicatory processes through *ex parte* pressures on persons designated to perform those administrative and adjudicatory functions.

(C.R. at 22, ¶¶ 33(g)–(k)) It was also alleged that the formation of respondents SHS and JCL by competing hospitals and, in turn, their entry into a joint venture violated section 7 of the Clayton Act, 15 U.S.C. § 18, and sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 and 2. (C.R. 17-21 and 26-27)

Phoenix Baptist alleged that as a result of this conspiracy "[c]onsumers of hospital services have been denied the benefits of free and open competition," that respondents and the other defendants "acquired, maintained and used a dominant and monopolistic share of the relevant markets," that respondents' "joint venture . . . threaten[ed] to achieve further foreclosure of the relevant market," and that Phoenix Baptist had "been denied the right of free and unlimited access to administrative and adjudicatory proceedings." (C.R. 23-25, ¶¶ 34(a), (b), (e) and (f))

Characterizing "[t]he gravamen of the complaint [as charging] that [respondents] violated the antitrust laws by prevailing over [Phoenix Baptist] in a comparative review before a statutorily mandated administrative agency" (C.R. at 54), respondents moved to dismiss and supported their motion with affidavits, exhibits and other matters outside of the pleadings. (C.R. at 30-260) Because the National Health Planning and Resources Development Act of 1974,

42 U.S.C. § 300*l*-2(b), (f), and Arizona statutes, Ariz. Rev. Stat. Ann. § 36-433 *et seq.*, required them to obtain a certificate of need before they could operate their hospital, respondents argued that their joint venture and their participation in the alleged conspiracy were exempt from the antitrust laws under both the "state action," *Parker v. Brown*, 317 U.S. 341 (1943); and *Noerr-Pennington* doctrines, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and did not fall within the "sham" exception recognized in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Respondents did not, however, deny the substantive allegations of the complaint that they were participants in a conspiracy to restrain trade in and to monopolize the business of providing hospital services in the Phoenix metropolitan area. Even though they had supported their motion with evidentiary matters outside the pleadings, respondents sought and obtained from the District Court a stay of all discovery pending consideration of their motion to dismiss. (C.R. at 2)

Opposing respondents' motion to dismiss, Phoenix Baptist argued that the "state action" exemption was not applicable because respondents' unlawful combination was wholly private conduct which was neither compelled by the state acting in its sovereign capacity nor actively supervised by the state, *cf. California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), even though the state did impose a licensure requirement before respondents could operate their hospital. To the same effect, the *Noerr-Pennington* doctrine was inapplicable because the alleged conduct was not a combination to obtain anticompetitive governmental action and, in any event, the allegations were sufficient to state a claim under the *Trucking Unlimited* exception to *Noerr-Pennington*. Finally, Phoenix

Baptist argued that summary judgment was inappropriate at such an early stage particularly where it had been denied the opportunity to pursue its own discovery and where even if everything respondents had argued were accepted as both true and legally sufficient that would not dispose of all of Phoenix Baptist's claims for relief. Phoenix Baptist submitted a statement of disputed issues of material facts pursuant to Rule 56(e), Federal Rules of Civil Procedure, (C.R. at 357-89) and an affidavit pursuant to Rule 56(f), Federal Rules of Civil Procedure, explaining why the stay of discovery prevented it from coming forward with further controverting evidence. (C.R. at 390-92)

Even though Phoenix Baptist's discovery had been stayed, the District Court considered respondents' affidavits and exhibits, treated their motion as one for summary judgment, found that there was no disputed issue as to any material fact, and entered summary judgment dismissing all claims without leave to amend the complaint. (Appendix C) The District Court did not issue an opinion explaining its decision.

A timely appeal was taken to the United States Court of Appeals for the Ninth Circuit which affirmed. Disregarding the allegations "of a much larger conspiracy to exclude [Phoenix Baptist] from the health care market and to concentrate more of the market in the hands of [respondents] and their parent organizations" (App. A at A4), the Court instead focused solely on respondents' "actions . . . in opposing Phoenix Baptist's application to build additional space." (App A. at A4) The Court held that these actions "were squarely within the doctrine of *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)," that they were not "a bad-faith campaign solely designed to harass a competitor attempting to obtain a governmental benefit" (App. A at A4-A5, *citing California*

Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972)) and that they were therefore exempt from the antitrust laws.

Turning next to the joint venture between the competing hospitals, the Court of Appeals recognized that "the formation of a joint venture to apply for a certificate of need for the new hospital stands on a different footing." (App. A at A5) The Court nonetheless held that this joint venture was exempt from antitrust scrutiny under the "state action" doctrine of *Parker v. Brown* even though the Court acknowledged "that Arizona law only compels parties to obtain a certificate of need to enter the hospital market, but does not compel large competitors to combine to concentrate the market." (App. A at A6 n.3) Relying upon its earlier decision in *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n.8 (9th Cir.), *cert. denied* 102 S. Ct. 2308 (1982), which had likewise rejected state compulsion as an element of the "state action" defense, the Court reasoned:

> The elaborate Arizona state procedures governing the certificate-of-need process represent a substantial modification and regulation of the hospital services industry. The National Health Planning and Resources Development Act specifically recognized that unlimited, free competition in the health care field often resulted in maldistribution of resources and inflation costs to consumers. *See* 42 U.S.C. § 300k(a); 300k-2(a)(12), (17); 300k-2(b)(2), (3). The state system of awarding certificates of need represents a statutory division of markets, pursuant to a Congressional mandate. Analysis under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) is required.

(App. A at A5-A6)

SUMMARY OF ARGUMENT

The Ninth Circuit decided two important questions of antitrust law in conflict with the decisions of this Court and of the other Courts of Appeals. The Ninth Circuit applied the *Parker v. Brown* "state action" defense to private anti-competitive conduct that was not compelled by the state even though other Circuits in similar situations have held that state compulsion is a necessary element of the defense. *E.g., Huron Valley Hospital, Inc. v. City of Pontiac*, 666 F.2d 1029 (6th Cir. 1981), *rev'g* 466 F. Supp. 1301 (E.D. Mich. 1979); *City of Fairfax v. Fairfax Hospital Association*, 562 F.2d 280 (4th Cir. 1977), *vacated* 435 U.S. 992 (1978), *on remand* 598 F.2d 835 (4th Cir. 1978). To the same effect, the Ninth Circuit applied the *Noerr-Pennington* exemption to afford complete immunity to a far-reaching conspiracy in restraint of trade even though other Circuits when confronted with comparable factual situations have held that the defense was not available. *Hospital Building Co. v. Trustees of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982); *Huron Valley Hospital, Inc. v. City of Pontiac, supra*.

This Court should issue a writ of certiorari to review the Ninth Circuit decision and to resolve the conflicts among the Circuits on these two important issues of antitrust law.

REASONS FOR GRANTING THE WRIT

I. BY IMMUNIZING PRIVATE ANTICOMPETITIVE AGREEMENTS THAT ARE NOT COMPELLED BY THE STATE, THE NINTH CIRCUIT HAS ADOPTED A STANDARD WHICH CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS

This is but the most recent in a series of Ninth Circuit decisions which have eliminated the requirement of

state compulsion from the state action defense.[3] Here, the Ninth Circuit applied the "state action" immunity to respondents' joint venture and their participation in an ongoing conspiracy in restraint of trade even though it correctly recognized "that Arizona law . . . does not compel large competitors to combine to concentrate the market." (App. A at A6 n.3) By extending the *Parker v. Brown* exemption to private conduct initiated voluntarily without compulsion or urging from any state body, officer or statute, the Ninth Circuit in this and in earlier cases has adopted an interpretation of the "state action" exemption that is in conflict with the decisions of this Court and of the other Courts of Appeals.

A. *The Ninth Circuit's Opinion Conflicts with the Decisions of this Court*

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court recently repeated the elements of the "state action" defense which had been set forth originally in *Parker v. Brown* and consistently followed in subsequent cases. *E.g., Rice v. Norman Williams Co.*, 102 S. Ct. 3294 (1982); *New Motor Vehicle*

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[3] *E.g., Ronwin v. State Bar of Arizona*, 686 F.2d 692, 696-97 (9th Cir. 1982) (compulsion not an element of state action defense; defense held inapplicable on other grounds); *Benson v. State Board of Dental Examiners*, 673 F.2d 272, 274-76 (9th Cir. 1982) (compulsion by state not one of criteria for state action defense); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n.8 (9th Cir.), *cert. denied* 102 S. Ct. 2308 (1982) ("*Goldfarb* does not preclude a finding of state action immunity . . . even though the [state] supervision does not rise to the level of compulsion. We recognize that other courts have found a 'compulsion' requirement when reviewing conduct of 'private' parties."); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823 (9th Cir. 1981) (state action defense sustained even though horizontal market division not required by state law).

Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In *Midcal*, this Court held that the threshold criterion of the "state action" exemption was whether the anticompetitive conduct was compelled by the State acting as a sovereign. After all, if the anticompetitive conduct was not mandated by the State, it would by definition be private conduct not entitled to the mantle of the "state action" exemption.

By extending the exemption to conduct which it recognized was not compelled by the State of Arizona, the Ninth Circuit has adopted a view of the "state action" defense which is in conflict with the decisions of this Court.

B. *The Ninth Circuit's Opinion Conflicts with the Decisions of the Other Courts of Appeals*

The Ninth Circuit's rejection of state "compulsion" as an element of the "state action" defense also conflicts with the decisions of the other Courts of Appeals. In circumstances similar to those here, both the Fourth and the Sixth Circuit Courts of Appeals have held that state "compulsion" is a necessary element of the defense and that a hospital's compliance with state licensure requirements does not create a state action defense for conduct not compelled by the state. *Huron Valley Hospital, Inc. v. City of Pontiac*, 666 F.2d 1029, 1032 (6th Cir. 1981), *rev'g* 466 F. Supp. 1301 (E.D. Mich. 1979); *City of Fairfax v. Fairfax Hospital Ass'n*, 562 F.2d 280 (4th Cir. 1977), *vacated* 435 U.S. 992 (1978), *on remand* 598 F.2d 835 (4th Cir. 1979).[4]

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[4] In another hospital merger case, the United States District Court for the Western District of North Carolina had adopted the same view as the Ninth Circuit and held that compulsion is not required and that

All of the other Circuit Courts of Appeals which have considered the issue have likewise held that state "compulsion" is a necessary element of the *Parker v. Brown* state action defense.[5]

The Ninth Circuit's view of the *Parker v. Brown* "state action" defense is therefore an aberration which conflicts with the decisions of every other Court of Appeals which has considered this issue. This Court should issue a writ of certiorari to resolve this conflict among the Circuits.

II. THE NINTH CIRCUIT'S IMPROPER EXTENSION OF THE *NOERR-PENNINGTON* DEFENSE TO PRIVATE ANTI-COMPETITIVE AGREEMENTS CONFLICTS WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS

The Ninth Circuit also improperly extended the *Noerr-Pennington* doctrine to be a complete defense to "a

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the state action defense is established simply by the fact of the state's issuance of a certificate of need. *North Carolina ex rel. Edminsten v. P.I.A. Asheville, Inc.*, 1982-2 CCH Trade Cas. ¶ 64,764 (E.D.N.C. 1981). That decision is now on appeal to the Fourth Circuit and the Federal Trade Commission and the U.S. Department of Justice have filed an amicus curiae brief urging reversal and arguing that the District Court's interpretation of the state action doctrine was too broad. *North Carolina ex rel. Edminsten v. P.I.A. Asheville, Inc.*, "Brief for the United States and the Federal Trade Commission as Amicus Curiae" No. 82-1058 (4th Cir.)

[5] Second Circuit: *New York State Elec. & Gas Corp. v. FERC*, 638 F.2d 388, 399 (2d Cir. 1980), *cert. denied* 102 S. Ct. 105 (1981) ("must be compelled by direction of the State acting as a sovereign"); Fourth Circuit: *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 482 n.10 (4th Cir. 1980), *cert. denied* 450 U.S. 916 (1981); *Ballard v. Blue Shield*, 543 F.2d 1075, 1079 (4th Cir. 1976), *cert. denied* 430 U.S. 922 (1977); Fifth Circuit: *United States v. Southern Motor Carriers Rate Conference, Inc.*, 672 F.2d 469 (5th Cir. 1982) *rehearing en banc granted* ____F.2d ____(5th Cir., June 7, 1982); *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1149 (5th Cir. 1977); and Seventh Circuit: *Kurek v. Pleasure Driveaway & Park District*, 557 F.2d 580, 587-91 (7th Cir. 1977), *vacated* 435 U.S. 992, *on remand* 583 F.2d 378 (7th Cir. 1978), *cert. denied* 439 U.S. 1090 (1979).

much larger conspiracy to exclude [Phoenix Baptist] from the health care market and to concentrate more of the market in [respondents'] hands." (App. A at A4) This result is in conflict with the decisions of this Court which have consistently held that the defense does not extend to private anticompetitive agreements even if they are approved by a governmental agency, *see, e.g., Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966); *see also Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945); *United States v. Trans-Missouri Freight Association*, 166 U. S. 290 (1897); or to anticompetitive private conduct which either supplants or prevents governmental action. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *see also Gibson v. Berryhill*, 411 U.S. 564 (1973).

Neither the National Health Planning and Resources Development Act of 1974, 42 U.S.C. 300k *et seq.*, nor the Arizona certificate of need statute, Ariz. Rev. Stat. Ann. § 36-433.01 (Supp. 1980-81), vests any administrative agency with jurisdiction to consider the anti-competitive effects of combinations between competing hospitals as part of the licensure process. Indeed, even if the anti-competitive effects of such combinations were considered during the licensure process and expressly ruled upon by an administrative agency, that would not have deprived the District Court of its obligation to consider the legality of respondents' combination under the antitrust laws. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *see also National Gerimedical Hospital and Gerontology Center v.*

Blue Cross, 452 U.S. 378 (1981); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

The Ninth Circuit's application of the *Noerr-Pennington* doctrine also conflicts with the decisions of at least two other Circuit Courts of Appeals which have rejected the defense in factual situations virtually identical to that involved here. *Hospital Building Co. Trustees of Rex Hospital*, 691 F.2d 678 (4th Cir. 1982); *Huron Valley Hospital v. City of Pontiac, supra*. This Court should issue a writ of certiorari in order to resolve this conflict between the Circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHOENIX BAPTIST HOSPITAL AND MEDICAL CENTER, an Arizona corporation, *Plaintiff-Appellant,*	No. 81-5848 DC No. CV 81-798 WEC
vs.	MEMORANDUM
SAMARITAN HEALTH SERVICES, an Arizona corporation, *Defendant,*	FILED AUG 25 1982 PHILLIP B. WINSBERRY CLERK, U.S. COURT OF APPEALS
and	
SHS HOSPITAL CORPORATION, JCL HOSPITAL CORPORATION, and LINCOLN SAMARITAN HOSPITAL AND HEALTH CENTER, *Defendants-Appellees.*	

Appeal from the United States District Court for the
District of Arizona
Walter E. Craig, District Judge, Presiding

Argued and submitted May 6, 1982

Before: CHAMBERS, ANDERSON, and SKOPIL,
Circuit Judges

Phoenix Baptist Hospital appeals from the district court's dismissal of its antitrust complaint as to three of the

original nine defendants.[1] We find that the complaint against these particular defendants concerned conduct protected from liability under the antitrust laws. We affirm.

FACTS

The health care delivery industry, and in particular the construction and market entry of new health care facilities, is subject to considerable state and federal regulation. The National Health Planning and Resources Development Act of 1974, 42 U.S.C. §§ 300k-300n-6, requires each state to adopt procedures to prevent unnecessary duplication of health care facilities in each geographic region. *Id.* § 300m-1. The state of Arizona complied and the requirements of the Act are carried out by the Director of the Department of Health Services. Planning decisions in the Phoenix metropolitan area are made by the Central Arizona Health Systems Agency ("CAHSA"), a non-profit corporation organized under the state statutes. The statutes require CAHSA to conduct an ongoing review of the availability of health care services in its geographic area, to develop plans for satisfying present and future health care needs, and to review applications for "certificates of need," which are required for construction of new health care facilities. Ariz. Rev. Stat. § 36-433.

In 1978 CAHSA conducted a study of the health care

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[1]It is not entirely clear from the record whether the district court's action was a dismissal for failure to state a claim under Fed. Civ. P. 12(b)(6), or a grant of summary judgment to these defendants under Fed. R. Civ. P. 56(b). Although it seems that the latter was the case, this procedural distinction is unimportant in view of our disposition of appellant's arguments.

needs in its area and decided that additional hospital bed space would be required over the next several years. It announced its plan to provide for the anticipated need by awarding a certificate of need for construction of additional hospital facilities. At this time defendants Samaritan Health Service and John C. Lincoln Hospital each created wholly-owned subsidiary corporations, SHS Hospital Corporation and JCL Hospital Corporation, respectively. These two non-profit subsidiaries, in turn, entered into a joint venture proposal to build a new hospital pursuant to the 1978 CAHSA plan. The joint venture was named Lincoln Samaritan Hospital and Health Center.[2]

After extended hearings, appeals, briefing and challenges in state court, the joint venture, Lincoln-Samaritan, was eventually awarded the certificate of need among the 15 applications filed. Phoenix Baptist Hospital was among the losers.

Later, in 1980, the Phoenix Baptist Hospital sought permission to add 91 beds to its existing hospital capacity. At the administrative hearing on this application the Health Center defendants appeared to offer opposition to the proposal. The application was initially approved. The Health Center defendants appealed to the Director of the Department of Health Services. This appeal, arguing that the decision below failed to consider the effect of the Health Center defendant's project, was successful and Phoenix Baptist's proposal was denied by the Director.

After losing in these administrative proceedings, Phoenix Baptist Hospital filed an antitrust action against

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[2]The two non-profit subsidiaries and the joint venture between them were the defendants dismissed by the district court's order, which is the subject of this appeal. For convenience, the three will be referred to herein as the Health Center defendants.

nine defendants, including the three Health Center defendants now before this court. The Health Center defendants moved for a stay of discovery and dismissal of the complaint as to them on the grounds that they were acting pursuant to federal and state-mandated procedures, and that they had a first amendment right to participate in the licensing procedures. Their motion was supported with affidavits. Phoenix Baptist Hospital responded, claiming that these administrative proceedings were only part of a much larger conspiracy to exclude them from the health care market and to concentrate more of the market in the hands of the Health Center defendants, and their parent organizations.

The district court stayed further discovery by Phoenix Baptist and dismissed the complaint against the Health Center defendants with prejudice. This timely appeal follows.

ANALYSIS

We recognize at the outset that the usual standards for granting summary judgment are even more strictly enforced in the antitrust context, where difficult inferences must frequently be drawn from complex facts. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *Betaseed, Inc. v. U & I Inc.*, ____ F.2d ____, No. 80-3490 (9th Cir. July 23, 1982). Nevertheless, the undisputed facts indicate that the conduct of these three defendants is insulated from antitrust liability.

The actions of the Health Care defendants in opposing Phoenix Baptist's application to build additional space fall squarely within the doctrine of *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). These and subsequent authorities clearly establish the rights of persons or commercial enterprises to participate

in governmental administrative or adjudicatory processes without regard to their anticompetitive effects. This right to petition government, grounded in the first amendment, is only lost where the participation is a "sham," a bad-faith campaign solely designed to harass a competitor attempting to obtain a governmental benefit. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 515 (1972); *Franchise Realty v. San Francisco Local Joint Executive Board,* 542 F.2d 1076, 1082 (9th Cir. 1976).

The facts surrounding the Health Center defendants' participation in the 1980 administrative proceedings, resulting in denial of Phoenix Baptist's request to expand, do not indicate a bad faith campaign, a groundless or "frivolous" attempt to influence the administrative process sufficient to bring the case within the "sham exception" to the *Noerr-Penninnton* rule. *See Ernest W. Hahn, Inc. v. Codding,* 615 F.2d 830, 842 (9th Cir. 1980). This conclusion is reinforced to some extent by the fact that the Health Center defendants were successful in their single attempt to influence the process. *Id.,* 615 F.2d at 841 n.13; *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.,* 674 F.2d 1252, 1264-65 (9th Cir. 1982).

The second aspect, concerning the formation of a joint venture to apply for a certificate of need for the new hospital, stands on a different footing. The elaborate Arizona state procedures governing the certificate-of-need process represent a substantial modification and regulation of the hospital services industry. The National Health Planning and Resources Development Act specifically recognized that unlimited, free competition in the health care field often resulted in maldistribution of resources and inflation costs to consumers. *See* 42 U.S.C. § 300k(a); 300k-2(a)(12), (17); 300k-2(b)(2), (3). The state system of awarding certificates of need represents a statutory division of markets, pursuant to a Congressional mandate. Analysis under

the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) is required.

Under the *Parker* rule, actions which might have anticompetitive effects are shielded from antitrust attack where two tests are satisfied: (1) the challenged restraint must be clearly expressed as pursuant to state policy, and (2) the regulatory scheme must be actively supervised by the state itself. *California Retailer Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *Miller v. Oregon Liquor Control Commission*, ____ F.2d ____, No. 80-3376 (9th Cir. July 7, 1982).[3] The Arizona scheme clearly satisfies these criteria. The policy behind the scheme is plainly articulated not only as state, but as federal policy. *See* National Health Planning and Resources Development Act, 42 U.S.C. § 300k-2. The continuing supervision criterion is met. The state continually evaluates the health care supply and demand in each appropriate geographic area, and allocates construction permits for new facilities only when the need arises.

Accordingly, we find that the action of the Health

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[3]Phoenix Baptist also argues that the *Parker v. Brown* doctrine requires an element of state "compulsion," that the state scheme must *require* the otherwise unlawful conduct, citing *United States v. Southern Motor Carriers Rate Conference*, 672 F.2d 469 (5th Cir. 1982) *rehearing en banc granted*, ____ F.2d ____, (5th Cir. June 7, 1982). Phoenix Baptist misconstrues the effect of the district court's order. Phoenix Baptist correctly points out that Arizona law only compels parties to obtain a certificate of need to enter the hospital market, but does not compel large competitors to combine to concentrate the market. However, only the actions taken by the Health Center defendants in applying for a certificate of need were "required" by state law. *See Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 823 n.8 (9th Cir. 1982). Any agreement, combination or conspiracy by their parent organizations would not be cloaked with the *Parker v. Brown* protection. The parent firms were not dismissed and are not now before this court.

Center defendants, in applying for a certificate of need for their new hospital, is afforded the limited protection provided by *Parker v. Brown*. The certificate application facts were not in dispute. The district court properly granted summary judgment as to these particular parties. We express no opinion on whether the parent corporations of the Health Center defendants may be liable under the broader conspiracy alleged by Phoenix Baptist.

Finally, Phoenix Baptist has moved to vacate the judgment because the trial judge should have recused himself from any participation in the case. It is alleged that the judge, prior to his judicial appointment in 1964, had been involved with the expansion plans of Good Samaritan Hospital. Whatever the trial judge's connection with Good Samaritan, it happened at least 15 years prior to the formation of the Health Center defendants. While we are sensitive to Phoenix Baptist's argument that a conspiracy should be viewed as a whole, the facts concerning these three defendants were undisputed.[4] The undisputed facts as to the Health Center defendants supported his correct conclusion that *their* actions in obtaining a certificate of need and in opposing Phoenix Baptist's 1980 application were protected. The motion to vacate the judgment will therefore be denied.

AFFIRMED.

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[4]We note that Judge Craig has recused himself from any further participation in the action against the parent corporations. Thus, any personal knowledge he may have concerning the alleged conspiracy, including the formation of the Health Center defendants much later on, will not affect subsequent proceedings.

Appendix B-1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHOENIX BAPTIST HOSPITAL AND MEDICAL CENTER, an Arizona corporation, *Appellant,*	No. 81-5848 DC No. CV 81-798 WEC
vs.	ORDER
SAMARITAN HEALTH SERVICES, an Arizona corporation, *Defendant,*	FILED DEC 28 1982 PHILLIP B. WINSBERRY CLERK, U.S. COURT OF APPEALS
and	
SHS HOSPITAL CORPORATION, JCL HOSPITAL CORPORATION, and LINCOLN SAMARITAN HOSPITAL AND HEALTH CENTER, *Appellees.*	

Appeal from the United States District Court
for the District of Arizona
Walter E. Craig, District Judge, Presiding

Before: CHAMBERS, ANDERSON, and SKOPIL, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

Appendix C-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PHOENIX BAPTIST HOSPITAL AND MEDICAL CENTER, INC., an Arizona corporation, *Plaintiff,* vs. SAMARITAN HEALTH SERVICES, an Arizona corporation; SHS HOSPITAL CORPORATION, an Arizona corporation; ARIZONA HOSPITAL SERVICE CORPORATION, an Arizona corporation; HEALTH ENTERPRISES, INC., an Arizona corporation; STANDARD SURGICAL SUPPLY CO., an Arizona corporation; HOSPITAL AMBULANCE SERVICE OF ARIZONA, INC., an Arizona corporation; JOHN C. LINCOLN HOSPITAL, an Arizona corporation; JCL HOSPITAL CORPORATION, an Arizona corporation; LINCOLN SAMARITAN HOSPITAL AND HEALTH CENTER, a joint venture of SHS HOSPITAL CORPORATION and JCL HOSPITAL CORPORATION, *Defendants.*	No. CIV 81-798 PHX WEC JUDGMENT FILED SEP 23 1981 W. J. FURSTENAU, CLERK UNITED STATES DISTRICT COURT THE DISTRICT OF ARIZONA

Appendix C-2

Defendants SHS Hospital Corporation, JCL Hospital Corporation and Lincoln Samaritan Hospital and Health Center (hereinafter "Health Center Defendants") having moved to dismiss the First Amended Complaint herein; and plaintiff having responded thereto; and the Court having considered the submissions of the parties and the oral argument of counsel this 21st day of September, 1981; and finding, whether said motion is viewed as a motion to dismiss or for summary judgment, that there is no genuine dispute of material fact and that there is no just reason for delay and that judgment should be entered on behalf of the Health Center Defendants,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the First Amended Complaint herein is dismissed with prejudice as to the Health Center Defendants, without leave further to amend said complaint.

DONE this 21st day of September, 1981.

s/ Walter E. Craig

United States District Judge
for the District of Arizona